No. 10313

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NORTH AMERICAN AVIATION, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In its brief respondent has in some respects seriously distorted the Board's position. Moreover, it has made certain contentions which were not anticipated by the Board or fully discussed in the Board's main brief. This reply brief is submitted in order to avoid any confusion of the Court as to the Board's position, which may result from respondent's brief, and to present the Board's argument as to such new matters as we think require further discussion in light of respondent's brief.

1. Respondent contends first (pp. 9, 18–22), in effect, that the Board's findings as to unfair labor practices and its order, are improper because of the contract between respondent and the charging union, which calls

for arbitration of disputes between the parties. But this contention, it is apparent, is essentially the same as that which respondent made before the Board, to the effect that the Board could not properly find that respondent violated the Act, because respondent's contract with the Union prohibits strikes and lock-outs and, it was argued, because respondent's conduct therefore may not be said to lead or tend to lead to labor disputes burdening or obstructing commerce (Brief to Board, pp. 25–28).

This argument, as we have pointed out in our main brief (note 2, pp. 2–3), is foreclosed by the Congressional finding in Section 1 of the Act as to the crippling effects of unfair labor practices upon commerce, and by Section 10 (a) of the Act, which provides that the power of the Board to prevent such unfair labor practices shall be "exclusive" and "shall not be affected by any other means of adjustment or prevention * * *." An essentially similar contention to that which respondent now advances was made to the Third Circuit and rejected by that Court in a carefully considered opinion on rehearing *en banc* in *N. L. R. B.* v. *Newark Morning Ledger Co.,* 120 F. (2d) 266, cert. denied 314 U. S. 693.

2. Respondent also suggests at various points in its brief that under the Act employees may individually present and prosecute grievances "to a final settlement, and without interference from the Union" (pp. 11–12, 23–36; see also pp. 45–46); that the "basic question" is whether "direct employer-employee grievance settlement [is] illegal" (p. 29); and that it is the Board's

position "that individual grievance presentation is prohibited" (pp. 36–38).[1] Respondent has distorted the Board's position. Contrary to respondent's contention, the Board maintains that the proviso to Section 9 (a) means precisely what respondent here apparently argues it means: that individual employees "shall have the right at any time to present grievances to their employer" (Section 9 (a) of the Act; Bd. Brief, pp. 17–18, 20–21, 22–23; see, also R. 60, 61, 63). And the Board expressly stated in its decision, as we have pointed out in our main brief (Board Brief, p. 23, note 16), that the right of employees to present grievances implies the right of the employer "to receive and act upon" them (R. 60.)[2] Accordingly it is clear that the Board made no argument such as respondent has painfully sought to refute.[3]

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[1] See also p. 56 of respondent's brief where it asserts that the "Board's decision, likewise its brief (citing pages), condemns individual presentation of grievances as an encroachment upon the Union's domain of collective bargaining."

[2] Of course, the grievance must be disposed of in accordance with the collective contract which establishes the terms and conditions of employment of *all* employees. And questions as to interpretation of the agreement must be determined by bargaining with the exclusive representative. See pp. 13, 22–23 of our main brief.

[3] The cases which respondent has cited in support of its position (Resp. Brief, pp. 29–36) hold no more than this. Insofar as these cases may suggest that individual bargaining is permissible under the Act despite the selection of a collective bargaining representative, they are plainly inconsistent with the majority rule principle enunciated in the Act and the Congressional intention. See our main brief, pp. 20–21, 23–26. The Seventh Circuit has recently so decided in a case where the issue was squarely presented. *N. L. R. B.* v. *J. I. Case Co.*, decided February 26, 1943, 12 L. R. R. 60. See, also, *Western Cartridge Co.* v. *N. L. R. B.*, decided March 1,

On the other hand, the position which the Board does take in its decision and brief, respondent has failed to refute in any essential respect. This position is fully set out in our main brief at pp. 13–18, 28–29. Briefly restated, it is that the establishment of a *grievance procedure* is an appropriate and indeed vital subject of collective bargaining since the grievance procedure is in a sense the judicial system under which the industrial enterprise affected operates; it is by recourse to it rather than to industrial strife, that disputes as to wages, hours, seniority, and all other conditions of employment normally will be determined.[4] An employer may not consistently with acceptance of the collective bargaining principle, after the employees have selected a collective bargaining representative which, as the agent of *all* the employees, has negotiated a grievance procedure, unilaterally establish a separate grievance procedure for presentation of grievances by individuals. The proviso to Section 9 (a) merely grants employees the right to *present and prosecute grievances individually and without any representative,* if they choose to do so. It has nothing to do, however, with establishment of the judicial system of the industrial enterprise; this still remains a subject of collective

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1943, 12 L. R. R. 79 (C. C. A. 7). Cf., also, *N. L. R. B.* v. *Montgomery Ward & Co.*, decided February 15, 1943, 12 L. R. R. 23, wherein this Court held that an "attempt to deal individually with the employees at a time when a strike was in progress, apparently the result of unproductive efforts in collective bargaining, is within the prohibition of Section 8 (1) of the Act." 12 L. R. R. at p. 24.

[4] Respondent states in its brief (p. 43) that "all this may be conceded."

bargaining, although employees may litigate in it *in personnas* if they prefer.

3. Respondent also argues (pp. 13, 40–44; see also, p. 29) in effect that the Union in its contract with respondent has consented to establishment of a separate procedure for individual grievances, and that the Board has "rewritten" the contract so as to "eliminate" this provision of the agreement (p. 41). It is difficult to believe that respondent makes this argument seriously.

Article V, Subdivision (10) of the contract, upon which respondent relies, provides merely that (R. 15):

> No provision of this Article shall be interpreted to prevent any employees or group of employees from presenting grievances to the management in accordance with the provisions of Section 9 (a) of the National Labor Relations Act.

The provision is unambiguous: clearly, all that it means is that employees may present grievances to the management, as permitted by Section 9 (a) of the Act. What Section 9 (a) means is left wholly undetermined. Plainly, the Union did not thereby agree, as respondent in effect suggests, to a construction which, as we have demonstrated in our main brief (pp. 19–28, 29), seriously limits the Union's authority as the exclusive bargaining agent and threatens to undermine the entire collective bargaining process. Indeed, the Union rejected a far less damaging provision during the negotiations, whereupon the present provision was agreed upon, on the suggestion of respondent's counsel, as a "compromise" (R. 98–99).

4. Respondent argues further (pp. 15, 47–48), in substance, that the right of employees to present grievances individually necessarily carries with it a right to respondent to "give notice of a procedure for receiving and passing upon individual grievances" (p. 48). But the issue is whether respondent was free to establish unilaterally a separate grievance procedure, such as it did, for individual grievances. Respondent's contention, of course, does not meet this issue. Moreover, as we have pointed out in our main brief (note 3, p. 18), the Board's construction of the proviso insures an orderly and uniform presentation of individual grievances pursuant to single procedure—that established by collective bargaining; respondent does not suggest why it is "necessary" to have a separate procedure, unilaterally instituted by respondent, for such grievances.

5. Respondent's suggestion (pp. 16, 49–58) that the Board's findings, in some respects, are outside the limits of the pleadings and proof, is equally meritless. The complaint plainly alleged that respondent, during the term of a collective bargaining contract containing provision for a grievance procedure, unilaterally established a stated separate grievance procedure for individual grievances and issued a stated notice to its employees advising them of such separate procedure;[5] and that "by its issuance of said notice and its establishment of said [separate] procedure," respondent violated Section 8 (5) and (1) of the Act (R. 4–5).

[5] The notice setting forth the procedure was attached to the complaint as an exhibit (R. 4, 21–22).

These allegations, we submit, clearly embrace the Board's findings, and the issues raised by them were fully litigated, as the record shows.

Moreover, it is well settled that the Act does not "contemplate or require pleadings to meet the exacting standards of a court of law. * * * All that is required of the complaint in such proceedings is that it shall state facts which shall enable the respondent to understand the offense which it is alleged the respondent has committed under the Act, and to understand the issue it will be required to meet. *N. L. R. B.* v. *Sunbeam Electric Mfg. Co.*, decided February 6, 1943, 11 L. R. R. 798, 799 (C. C. A. 7). The pleadings here fully performed this function.

6. Other contentions made by respondent are, we submit, specious on their face or fully discussed in our main brief, and require no elaboration here.

Respectfully submittted.

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Argued by Mr. Ricoson.

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